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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL VINCENT LUJAN,

Defendant and Appellant.

C050355

(Sup.Ct. No. 99F00789)

A jury found defendant Michael Vincent Lujan guilty of five counts of lewd and lascivious acts upon a child under the age of 14 (his daughter) by the use of force, violence, duress, menace, and the threat of great bodily harm, and one count of aggravated assault also against his daughter. Defendant's motion for new trial based on ineffective assistance of counsel was denied, and defendant appealed. The judgment was reversed solely for resentencing (and affirmed in all other respects) to allow the

trial court to articulate its reasons for imposing consecutive sentences under Penal Code¹ section 667.6, subdivision (d).

At resentencing, the trial court elected to apply section 667.6, subdivision (c) (hereafter section 667.6(c)) to impose consecutive sentences, setting forth its reasons for application of that statute. Defendant appeals the ruling on the grounds that the trial court failed to state its reasons for choosing to impose consecutive rather than concurrent sentences, the factors used to justify imposition of the upper term were invalid, and any failure by defendant to raise these issues on appeal was the result of ineffective assistance of counsel.

We conclude that defendant has forfeited his first two arguments because he failed to raise an objection at resentencing, and that any ineffective representation defendant received did not result in prejudice. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case have previously been cited at length by this court in defendant's first appeal in case No. C043275.² We adopt the operative facts as follows:

¹ All further statutory references are to the Penal Code unless otherwise indicated.

Defendant had two children with S.: the victim and M. Defendant and S. were never married, and were not living together during the events at issue.

On January 17, 1999, defendant agreed to take S. to visit her youngest child's father at Folsom State Prison, and to babysit the victim and her brother while S. was visiting. Defendant picked up S. around 7:00 or 8:00 a.m. They stopped to get gas, then went to the prison. When defendant left S. at the prison, it was with the understanding that she would call him at his sister's house at 3:00 p.m., or he would automatically return at 3:00 p.m. to take her home. When S. exited the prison at 3:00 p.m. defendant was not there. She called both defendant's sisters, but was unable to reach him at either place. She ultimately located defendant, and he arrived at the prison around 4:00 or 5:00 p.m. S. noticed her daughter, who was five years old, was unusually quiet on the way home and that she was dressed in different clothes than she had been wearing that morning.

After S. and her daughter arrived home around 5:30 p.m., the daughter went into the bathroom where S.'s niece, A., was

² Defendant filed a motion requesting that the court take judicial notice of the record and briefs in his prior appeal (case No. C043275). That motion will be treated by this court as a request to incorporate the prior record and briefs by reference, and is hereby granted.

styling her hair. S. overheard her daughter tell A. her stomach hurt. A. asked the victim why her stomach hurt, and the victim told A. to shut the door. A few minutes later, A. came storming out of the bathroom, yelling at S. that she was "sick" for letting her daughter go with defendant. A. told S. what the victim had told her.

S. spoke to her daughter, who refused to say anything at first for fear she would get in trouble. Eventually, the victim told S. that while her brother was asleep on the couch, defendant put her on the bed, lay on top of her, and kissed her neck. He rubbed pink lotion on her, then lay on top of her and "tried to hump her." The victim said after it was over defendant made her take a bath and change her clothes.

S. called the police, who took a statement from the victim. The victim described sexual intercourse with her father, and described her father's ejaculation. She said her father wanted her to orally copulate him, but she refused. She also described defendant rubbing lotion on her, including her "private part" and said defendant licked her "private part." Defendant also tried to stick his tongue in her mouth. Defendant told his daughter not to tell anyone what had happened or he would hurt her, and made her take a bath.

Defendant stipulated to a 1986 conviction for rape.

A jury convicted defendant on five counts of lewd and lascivious acts upon a child under 14, and one count of aggravated sexual assault on the same victim. Defendant moved for a new trial on the grounds of inadequate representation by his trial counsel. That motion was denied. Because defendant was a second strike offender, the trial court sentenced him to twice the determinate term. The trial court further found defendant had sufficient time to reflect on each of his offenses, requiring fullterm consecutive sentences. Defendant was sentenced to a determinate term of 53 years in prison and an indeterminate term of 30 years to life, for a total term of 83 years to life.

Defendant appealed, arguing he was denied effective assistance of counsel both at trial and the subsequent motion for new trial. This court affirmed the rulings below, but reversed on the issue of the imposition of sentencing, remanding the case to the trial court to articulate on the record its reasons for imposing consecutive sentences under Penal Code section 667.6, subdivision (d) (hereafter section 667.6(d)).

At resentencing, the trial court explained that it was "prepared to reaffirm its original sentence, not under this statute [Pen. Code section] 667.6(b) but rather under 667.6(c) . . ." and that "my reasons essentially would be much the same reasons that I gave for imposing the upper term on Counts 1, 3,

and 4, namely, the defendant's criminal history, the vulnerability of the victim, and all the other matters that were referred to in my imposition of upper term as to Counts 1, 3 and 4." Defendant's counsel argued the lack of evidence to support a finding that the acts charged were separate acts. After oral argument, the trial court ruled as follows: "In this case the Court of Appeal has found wanting the -- a basis for consecutive sentencing by the Court as to Counts One, Three and Four. This Court previously sentenced defendant under penal code section 667.6(d), which only permits fullterm consecutive sentencing if there were quote 'separate occasions' close quote when a single victim was molested. The Court found that there were no real facts demonstrating that there were separate occasions involving the minor victim. [¶] Given this omission, the Court will sentence defendant under a different statute, namely the discretionary provisions of [P]enal [C]ode section 667.6(c). Exercising its discretion, the Court finds that the following factors warrant consecutive terms for Counts One, Three and Four: I find each of the acts to be separate acts of violence, even though they occurred on a separate [sic] occasion. All of them were against a five year old victim. The defendant was the victim's father and took a position of trust and confidence to commit the offense, which is an aggravating circumstance under rule 4.421 of the California Rules of Court. Moreover, the

defendant has a long criminal history and his prior convictions are both numerous and are of increasing seriousness, which is likewise an aggravating factor under rule 4.421(b)(2). [¶] For these reasons just recited, the Court has deliberately selected fullterm consecutive terms under the provisions of 667.6(c) not 667.6(d). With that singular exception, all prior orders remain in effect and are adopted by the Court as though fully set forth on the record, including of course the defendant's credits and other matters previously ordered by the Court. [¶] Accordingly the total sentence of the Court, that is both determinate and indeterminate, are unaffected by the resentencing of the Court, the only change being the basis upon which the Court has imposed fullterm consecutive sentencing as to Counts One, Three and Four. [¶] The defendant still has appeal rights."

Although the defendant himself engaged in a short dialogue with the court, defendant's counsel did not assert any objections to the court's ruling. Defendant appeals from that ruling.

DISCUSSION

I *Forfeiture*

Defendant initially contends that the trial court failed to state its reasons for choosing to impose consecutive rather than concurrent sentences, and that the factors used to justify

imposition of the upper term were invalid. The People argue that defendant has forfeited those claims by failing to object at the resentencing hearing. We agree.

Prior to resentencing, defendant's counsel was apprised of the court's intended ruling and given an opportunity to prepare a response. At the hearing, the sole issue raised by defendant's counsel was whether or not the record supported a finding that each act by the defendant was a separate act. Even if we were to expansively construe defendant's objection at resentencing, his argument fails to satisfy the obligation to object. Consequently, defendant has forfeited his objections. (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Partida* (2005) 37 Cal.4th 428, 433-435 [appellate review precluded unless party states precise basis of objection].)

II

Ineffective Assistance of Counsel

In the alternative, defendant contends that any failure by him to raise the resentencing issues on appeal was the result of ineffective assistance of counsel. Because defendant has failed to demonstrate any resulting prejudice, we disagree.

Defendant's claims of error are based on the premise that, at resentencing, the reasons given by the trial court for imposing the upper term were the same as those given for

imposition of consecutive rather than concurrent sentences under section 667.6(c). The record does not bear that contention out.

At the original sentencing hearing, the trial court stated, as its reason for imposing consecutive sentences, "under subdivision (d), that is, 667.6(d), that the defendant had sufficient time to reflect on each of the offenses, and, therefore, they are separate occasions requiring, uh, mandatory full-time consecutive sentences." In imposing the upper term as to counts 1, 3, and 4, the court stated as follows: "I have selected [the] upper term only because of the aggravating circumstances in this case, which are the defendant's substantial prison history, the fact that the victim was vulnerable, the fact that the offense indicated a high degree of cruelty, viciousness, and callousness, and the fact that the defendant's prior performances on both probation and parole have been unsatisfactory." The court also noted that there were no mitigating circumstances.

At resentencing, in response to this court's specific direction on remand that the trial court state its reasons for imposing consecutive sentences under section 667.6(d), the trial court instead elected to impose consecutive sentences under section 667.6(c), and gave the following reasons: (1) each act is separate act of violence; (2) all acts were against a five

year old; (3) defendant was the victim's father who took a position of trust and confidence to commit the offense; (4) defendant has a long criminal history, and (5) defendant's prior convictions are numerous and of increasing seriousness.

Having responded to the specific instructions of this court on remand, the trial court ruled that, with the exception of the reasoning just articulated, "all prior orders remain in effect and are adopted by the Court as though fully set forth on the record" By so stating, the trial court expressly adopted its prior ruling regarding imposition of the upper term.

The failure of defendant's counsel to object at the time of resentencing did not result in prejudice to defendant. At least one of the factors cited by the trial judge -- that the acts were separate acts of violence -- was a valid factor in imposing consecutive sentences. (Cal. Rules of Court, rule 4.425.)

"[O]ne relevant and sustainable fact may explain a series of consecutive sentences." (*People v. Scott, supra*, 9 Cal.4th at p. 350, fn. 12.) Similarly, the fact that the offense indicated a high degree of cruelty, viciousness and callousness, that the defendant's prior performance on probation and parole was unsatisfactory and that the victim was vulnerable (which we do not find to be synonymous with the victim's age for purposes of the dual use prohibition) were all valid factors for imposing the upper term. (Cal. Rules of Court, rule 4.421.) A trial

court may rely on a single factor in imposing the upper term, so long as that sole factor outweighs any mitigating circumstances. (*People v. Osband* (1996) 13 Cal.4th 622, 728; *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.) Those factors, weighed against the absence of any facts in mitigation, provided a proper basis for the trial court to apply the upper term.

We also find that the trial court articulated sufficiently its reasons for imposing consecutive sentences and for doing so under section 667.6(c). Specifically, the trial court found five factors to "warrant consecutive terms," and further stated that, "[f]or these reasons just recited, the Court has deliberately selected fullterm consecutive terms under the provisions of 667.6(c) not 667.6(d)." The reasons for applying section 667.6(c) and imposing consecutive sentences can be the same. (Cal. Rules of Court, rule 4.426(b).) We find no prejudice to the defendant.

III

Blakely Argument

Defendant contends he was denied his constitutional right to trial by jury when the court imposed consecutive terms based on facts that had not been found true by the jury or proven beyond a reasonable doubt, thereby violating the principles enunciated in *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403]. The California Supreme Court rejected an

identical claim in *People v. Black* (2005) 35 Cal.4th 1238, and we are bound by that decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.